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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

CONNIE YON and DELORES BRYANT,

Petitioners,

vs.

DEPARTMENT OF CORRECTIONS, State of F.ida,

Respondent.

Petition for a Writ of Certiorari to the
District Court of Appeal
First District, State of Florida

PETITION FOR A WRIT OF CERTIORARI

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6788

QUESTION PRESENTED FOR REVIEW

Does either Title VII of the Civil Rights Act of 1964 or the Fourteenth Amendment estop a state governmental employer from denying sexual harassment in court after that employer has proved the identical sexual harassment in a prior adversarial proceeding?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case, as well as Steve Comerford, who was a co-defendant with the Department of Corrections, State of Florida. There is no parent or subsidiary of any party to be listed.

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No.

In The

Supreme Court of the United States

October Term, 1997

CONNIE YON and DELORES BRYANT,

Petitioners,

vs.

DEPARTMENT OF CORRECTIONS, State of Florida,

Respondent.

Petition for a Writ of Certiorari to the
District Court of Appeal
First District, State of Florida

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Connie Yon and Delores Bryant, respectfully petition for a writ of certiorari to review the judgment of the District Court of Appeal, First District, State of Florida.

OPINIONS BELOW

The holding of the Florida First District Court of Appeal, affirming *per curiam* the final judgment of the trial court, is reported at 698 So. 2d 1227 (Fla. App. 1997), and reproduced in the Appendix at 3a. The denial of rehearing dated August 28, 1997, is reproduced in the Appendix at 1a. The unpublished Final Judgment of the trial court, Case No. 93-4635 (Fla. 2d Judicial Circuit, Leon County, September 4, 1996) is reproduced in the Appendix at 4a. In related proceedings, the unpublished Final Order of the Florida Public Employee Relations Commission (Case No. CS-93-205 August 26, 1993) is reproduced in the Appendix at 6a. The Hearing Officer's Recommended Order in the same case is reproduced in the Appendix at 8a.

STATEMENT OF JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257. *See, The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). This Court reviews *per curiam* affirmances of Florida District Courts of Appeal as decisions of the highest court of the State in which a decision could be had. *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); *Palmore v. Sidoti*, 466 U.S. 29 (1984). The initial decision of the Florida First District Court of Appeal was rendered on July 18, 1997. The court denied rehearing on August 26, 1997.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provision of the United States Constitution is the Fourteenth Amendment, which provides:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (hereinafter Title VII), is set forth below.

> § 2000e-2. Unlawful employment practices.
>
> (a) Employer practices
> It shall be an unlawful employment practice for an employer -
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . . .

STATEMENT OF THE CASE

On November 1, 1993, Petitioners Yon and Bryant commenced this action against the Florida Department of Corrections (DOC) in the Circuit Court of the Second Judicial Circuit In And For Leon County, for sexual harassment and retaliation under Title VII and various State causes of action.

Yon and Bryant were correctional officers at Liberty Correctional Institution in Bristol, Florida, under the command of Comerford, who, as the institution's major, was the third highest official on site and department head of all officers. For approximately three years ending in early 1993, Comerford regularly inflicted unwanted sexual attention, comments, and touching upon Yon and Bryant. T-2, 212-T-3, 270; T-4, 380-409. Each Plaintiff had one episode of quid pro quo intercourse with Comerford. *Id.* Comerford routinely called each of the Plaintiffs into his office on some work-related pretext, whereupon he would lock the door, pull the shade, and grope their breasts, crotches, and buttocks, kiss them, and make sexual propositions, all against their will. *Id.*

When Yon and Bryant refused to submit to further sexual touching by Comerford, he retaliated against them in various ways. As a result, Bryant resigned in December, 1992, effective January 15, 1993. Yon filed a formal complaint of sexual harassment against Comerford on February 8, 1993, through DOC's internal process. Shortly thereafter, certain incidents at the prison led Yon to believe that Comerford and junior officers loyal to him were seeking to arrange a situation in which she would be attacked and injured by prison inmates. As a result of Yon's reaction to these events, her psychiatrist pulled her from regular duty on or about March 3, 1993. She has been on unpaid leave ever

since.

As a result of the investigation of Yon's charge, DOC identified four other women, including Plaintiff Bryant, whom Comerford had sexually harassed at Liberty Correctional Institution. T-4, 435-449. The investigation further brought to light a report of an investigation in 1988 of allegations against Comerford of sexually harassing three female officers at another prison, Calhoun Correctional Institution. R-9, PX-21.

DOC had years earlier had problems with Comerford sexually harassing women while employed at still another facility, Zephyrhills Correctional Institution. The Superintendent of that facility, with approval of the legal and personnel officials at DOC headquarters, had ordered Comerford to undergo an involuntary psychiatric evaluation as a result of the persistence of these problems. T-3, 334-337.

Dr. Daniel Sprehe examined Comerford on May 13, 1985. Comerford and a DOC official who met with Dr. Sprehe described seven women who had accused Comerford of improper sexual conduct during his time as an official at Zephyrhills Correctional Institution. T-6, 663-669. The Zephyrhills Correctional Institution personnel manager, Susan Burgess, testified that she and her sister had also been sexually harassed by Comerford at that institution. T-2, 198-199.

Susan Burgess testified that the institution's files on Comerford's psychiatric referral were stolen and never replaced. T-2, 204-208.

Comerford had never received discipline of any sort

for his conduct with the nine women at Zephyrhills or the three at Calhoun. Following the investigation of the events at Liberty, however, DOC fired Comerford in a letter dated April 28, 1993. R-IX, PX-16. The letter stated that the reasons for Comerford's firing were that

> [Y]ou made **unwelcome and inappropriate sexual advances** and **other unwelcome conduct of a sexual nature** towards Officer Connie Yon, Sergeant Delores Bryant, Ms. Tammy Shuler, Ms. Susan Johnson, and Ms. Priscilla Casseaux.

Id. (emphasis added).

Comerford appealed his firing to the Public Employee Relations Commission (PERC). DOC vigorously defended the firing at a hearing and in a recommended order, pillorying Comerford for sexual harassment:

> His conduct was **unwelcome**, it was sexual in nature, it was offensive and it created a hostile work environment for the women involved.

"Agency's Proposed Recommended Order," R-III, 492 (emphasis added).

DOC completely accepted Yon's and Bryant's explanation of the results of Comerford's actions:

> The consequences of his actions toward Yon and Bryant are that Bryant felt as though she had to resign to escape harassment for her rejection of the Employee's sexual advances and Yon is on leave without pay status, under

> a psychiatrist's care, due to the Employee's sexual harassment of her.

Id., R-III, 493.

In a Recommended Order dated July 28, 1993, (Appendix E herein) PERC Hearing Officer Jack Ruby adopted substantially all of the positions urged upon him by DOC in upholding the firing of Comerford. The Hearing Officer concluded that Yon and Bryant had suffered sexual harassment as defined by civil law, not just under DOC policy. He found that three other victims of Comerford, Tammy Shuler, Priscilla Casseaux, and Susan Johnson, experienced sexual harassment within the meaning of agency policy, but, in the case of Appellants, the harassment met all definitions, statutory or administrative:

> As noted by Comerford's own argument, his conduct concerning co-workers Yon and Bryant, if true, is **significantly more egregious and would establish sexual harassment under any legal standard.**

R-VI, 1113 (emphasis added).[1]

In the course of finding that Comerford's behavior amounted to quid pro quo harassment as well as hostile

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[1] The Hearing Officer took the trouble to establish that DOC was civilly liable as an employer for Comerford's sexual harassment as a supervisor under *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72-73 (1986), and that Comerford's actions were sufficiently severe as to create an abusive working environment within the meaning of Title VII under *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1522-27 (M.D. Fla. 1991). *Id.* at 1112.

environment harassment, the Hearing Officer found this:

> [T]he circumstantial evidence as well as their demeanor, credited the testimony of both Yon and Bryant that they were coerced, as single parents supporting sick and minor children, into sexual acts and conduct (including intercourse) which they found offensive and which was unwelcome and uninvited.

Id. at 1114.

The Recommended Order recited that either party could file exceptions to it. *Id.* at 1119. No exceptions were filed by DOC or by Comerford.

PERC issued a Final Order (Appendix D herein) adopting the Hearing Officer's Order in its entirety (including, of course, the finding that Yon and Bryant suffered sexual harassment under applicable statutes as well as under agency policy, and the finding that DOC is civilly liable for the acts of Comerford in this context). R-VI, 1121. The Final Order recited that it could be appealed to the District Court of Appeal. *Id.* No appeal was taken by anyone.

In a worker's compensation proceeding concerning Appellant Yon, DOC stipulated that Comerford sexually harassed Yon and was fired for it. (R-VI, 1123.) In his Order, Judge of Compensation Claims C. Douglas Brown noted that the facts were virtually undisputed. *Id.* at 1124. Nor did DOC contest this finding:

> Claimant suffers both physical and mental illness causally related to sexual harassment

by Major Comerford.

Id. at 1129.

Despite all the foregoing advocacy, stipulation, and admissions (both affirmative and constructive), DOC took an inconsistent position when Yon and Bryant brought their Title VII action, stating the following as an affirmative defense:

> As the Plaintiffs freely and voluntarily entered into a relationship with Commerford [sic], his alleged advances were not unwelcome and do not therefore, constitute sexual harassment.

R-I, 61. Respondent placed its emphasis there for the remainder of the case.

Partly in light of the prior positions of DOC, Yon and Bryant called into question the legitimacy of Defendants using the tactic of portraying them as dishonest and sexually promiscuous in the absence of any new development other than the fact that they brought a Title VII suit. Petitioners therefore moved, on August 5, 1994, for a protective order, arguing that DOC should be estopped from changing the position it had successfully maintained in prior proceedings and that DOC should be limited in the manner and content of its discovery into the sexual history of Petitioners. R-III, 445-514.

The trial court issued an Order on September 21, 1994, granting in part and denying in part the motion for protective order. R-IV, 657-658. The Order explicitly rejected Petitioners' contention that DOC should be estopped

from claiming that Comerford's advances were welcome.[2]

DOC moved successfully to exclude from evidence any materials from the PERC hearing (and other administrative hearings such as worker's compensation, social security disability, and the Florida Commission on Human Relations), including DOC's own admissions. R-IX, 1686.[3]

The court below entered Final Judgment on September 5, 1996, on a jury verdict finding no sexual harassment. R-VII, 1387 (Appendix C herein). Petitioners' timely appeal resulted in a *per curiam* affirmance. (Appendix B herein). Petitioners' timely rehearing motion was denied. (Appendix A herein).

The Title VII claims have been in the case from the very beginning. As noted above, the judicial estoppel argument was first raised in a motion for protective order to the trial court about two years before trial. In that motion, Petitioners did not use the words "judicial estoppel," but quoted an authority that distinguished estoppel in legal proceedings from from a weaker sort that required reliance

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[2] Yon and Bryant took an interlocutory Petition for Certiorari to the First District Court of Appeal on these matters. Yon and Bryant used the term "judicial estoppel" in their reply in that proceeding, though Respondents contend that such language never appeared in the case until after judgment. The state appeals court denied certiorari. *Yon and Bryant v. Department of Corrections and Comerford*, Case No. 94-3408 (Fla. 1st DCA 1995).

[3] At trial, however, the court below permitted DOC to use testimony from the PERC hearing to create an impression that Yon made an inconsistent statement. In so doing the court adhered to its position that the plaintiffs were still barred from introducing inconsistent statements made by DOC in the context of the PERC proceedings. T-3, 274-276.

and injury before estoppel would be applied. When the trial court refused to estop Respondent, Petitioners sought an interlocutory writ of certiorari from the First District Court of Appeal. In that proceeding, Petitioners first used the term "judicial estoppel." The writ was denied. Petitioners first argued that failure to apply judicial estoppel violates the Fourteenth Amendment in a motion for rehearing to the First District Court of Appeal. The order denying that motion is Appendix A hereto.

On every issue, Petitioners meet this Court's standards for adequate presentation of issues to the courts below. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980).

REASONS FOR GRANTING THE WRIT

I.

The courts below violated the Fourteenth Amendment by permitting a state governmental employer to defend a sexual harassment claim on the ground of welcomeness after that same employer had established the unwelcomeness of the same conduct in a prior proceeding and no new evidence was discovered between the two proceedings.

DOC fired Comerford for sexually harassing Appellants and three other women. At Comerford's hearing before the Public Employee Relations Commission, DOC successfully established that Appellants did not welcome Comerford's advances. When Appellants sued DOC for Comerford's actions, however, DOC, with no new evidence of welcomeness, adopted the very position it had previously defeated and secured a defense verdict from the jury. The

trial court not only refused to apply estoppel, but actually excluded from evidence, (a) any mention that DOC had previously argued an inconsistent position, as well as (b) any prior inconsistent statements by DOC in connection with the PERC hearing. The court below compounded the error by allowing DOC to impeach one of the Petitioners with a prior inconsistent statement in her testimony at the PERC hearing. This inequity calls for redress.

A. Unfairness Of Constitutional Proportions Hurts The Judicial System

Failure to apply principles of judicial estoppel rises to the level of a violation of the "due process" clause of the Fourteenth Amendment to the United States Constitution.

The due process clause protects a legitimate claim to a fair and impartial judicial proceeding. Such a claim rises to the level of a constitutionally protected property interest. *See, Drake v. Kemp*, 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark, J., specially concurring) ("A fair trial in a fair tribunal is a basic requirement of due process.")

According to this Court, a constitutionally guaranteed property interest is established where a claimed entitlement is one on "which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). For constitutional protection, parties need not have an absolute entitlement to the interest, but merely a "legitimate claim" to it in order for process to be due. *Haymons v. Williams, 795 F. Supp. 1511, 1523 (M.D. Fla. 1992)* (recipient need not be entitled to home health care benefits to be denied due process, but rather have a legitimate *claim* to entitlement). In addition, that process which is due must be meaningful and reasonable.

See, Hann v. Carson, 462 F. Supp. 854, 866 (M.D. Fla. 1978). Property interests vest in state "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *South Florida Citrus Growers v. United States Department of Agriculture*, 554 F. Supp. 633, 636 (S.D. Fla. 1982). Petitioners have a legitimate claim to entitlement of a fair and impartial judicial proceeding, and a vested interest in long established rules of law, such as judicial estoppel.

Failure to apply the doctrine of judicial estoppel where a party asserts inconsistent positions renders a judicial proceeding fundamentally unfair. *See, e.g., Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark J., concurring) ("flip flopping" theories, which are totally inconsistent, in successive proceedings, violate fundamental fairness essential to the very concept of justice); *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990) (applying judicial estoppel to state's argument where it flatly contradicts the one made in the lower court and where allowing it would deprive opposing party of substantial rights); *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990) (disallowing state's inconsistent argument where it "put the petitioner in a catch-22 position").

The doctrine of judicial estoppel applies when parties make a "calculated assertion of divergent sworn statements. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings." *American National Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983). Such actions have been found to taint a judicial proceeding, thereby rendering it fundamentally unfair. *Drake v. Kemp*, 762 F.2d at 1478. Judge Clark, concurring in *Drake*, noted that this particular type of "gamesmanship" robbed the judicial process of its primary purpose of searching for the truth. *Id.* at 1479; *see also,*

Blankenship v. Estelle, 545 F.2d 510, 513-514 (5th Cir. 1977) (noting that testimony does not have to be technically perjurious to fall within the ambit of knowing use of false testimony).

In a factually similar case, a court applied judicial estoppel to a city government which disciplined a police officer in a formal administrative proceeding for scratching a woman's chest when, in her later civil suit, the city sought to prove that he did not scratch her. *Czajkowski v. City of Chicago*, 1993 WL 11896 (N.D. Ill. 1993) (policy considerations in judicial estoppel apply with equal force to governmental litigants).

B. Compromise Of Integrity Of System By Unequal Application Of Evidence Rules

The cases cited above establish that failure to enforce judicial estoppel compromises the integrity of the courts. The compromise is seriously aggravated where, as here, the aggrieved party is forbidden from even showing the jury that the offending party has previously proved the opposite of what it now argues.

Even more egregious is that, though any matter from the PERC hearing was totally off-limits to the plaintiffs below, DOC was allowed to introduce a plaintiff's statements from the PERC hearing and impeach her with it. This is so manifestly inequitable as to undermine confidence in the system.

C. Extra Concern For Integrity of Governmental Litigants

While courts are charged with ensuring the appropriateness of the conduct of all litigants appearing before them, some measure of self-interest driven by profit or other factors is expected of private defendants in sexual harassment cases. Government agencies, by contrast, have a responsibility to serve the interests of truth and justice in every proceeding. The Court below overlooked or misapprehended the degree to which public confidence in government is undermined by the exercise of less than due diligence in policing abuses of the judicial system by public agencies.

II.

Effectuation of Title VII requires that courts prevent employers from benefitting by establishing contradictory results in successive tribunals.

The courts below allowed DOC to accomplish a species of double recovery. In proving Yon and Bryant to be victims of unlawful sexual harassment at PERC, DOC was able to rid itself of the liability of continuing to employ Comerford -- a liability that, by 1993, had grown more formidable than it had been during the 15 documented years in which DOC had winked at Comerford's harassment of at least 12 other women. On the other hand, DOC escaped the cost of making Petitioners whole by later alleging to a jury that Petitioners welcomed Comerford's sexual advances -- a jury that was not permitted to know that DOC had already proved the contrary in an earlier proceeding.

A. "Make Whole" Policy of Title VII

This Court has repeatedly declared that Title VII is no ordinary remedial statute, but the effectuation of a national policy of the "highest priority," as stated in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-4 (1976) (and the precedents cited therein). This Court has therefore urged liberal construction of Title VII to give the broadest sweep to accomplishment of its purposes. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-22 (1975), established that the goals of Title VII are not only to put an end to discrimination in workplaces, but to "make whole" the victims of such discrimination. In the instant case, DOC furthered the first purpose of Title VII by establishing that Comerford should be fired for unlawful sexual harassment of Petitioners. But the second purpose, compensation of the victims, was thwarted by the assertion of an inconsistent position in court -- a position known to be false.

This Court's recent jurisprudence has built upon the foregoing precedents by disapproving judicial policies and procedures that impede the remedies of civil rights plaintiffs. In *McKennon v. Nashville Banner*, 115 S.Ct. 879 (1995), the Court limited the employer's use of after-acquired evidence because:

> [T]he broader objectives of [the anti-discrimination statutes] are furthered when even a single employee establishes that an employer has discriminated against him or her.

Id. at 885. *See also, Walters v. Metropolitan Educational Enterprises*, 117 S.Ct. 660 (1997) (disapproving lower court's conservative method of counting employees for purposes of the jurisdictional requirement of discrimination statute), and

Robinson v. Shell Oil, 117 S.Ct. 843 (1997) (extending anti-retaliation provisions of Title VII to protect former as well as current employees).

B. Chilling Effect On Other Victims And Witnesses

This Court has stressed that interests served by discrimination statutes are of society as a whole, not just the individual victims. These important public interests are vindicated by giving plaintiffs the status of "private attorneys general" who are encouraged to bring suit by the availability of attorney fees and the priority and liberal construction used to enforce discrimination statutes. *Albemarle, id., citing, Newman v. Piggie Park Enterprises*, 300 U.S. 400 (1968).

If, as in the instant case, victims and witnesses risk great reprisal and injury in coming forward to assist government agencies in PERC proceedings (and counterpart agencies in other states) in firing sexual harassers, and if those agencies are then permitted to pull the rug out from under those victims and witnesses to avoid agency liability in later proceedings, the result is not only a corruption of the judicial system but a tacit protection for sexual harassers. Victims and witnesses can not be expected to cooperate in giving forthright testimony in disciplinary proceedings against offenders if those victims and witnesses can foresee having their credibility and careers destroyed when their department flip-flops in a later civil suit. The courts below overlooked or misapprehended the chilling effect on truthful testimony in future cases that must result from failure to apply judicial estoppel to DOC in this case.

III.

This Court needs to resolve conflict in the federal circuits over the application of judicial estoppel in cases brought under discrimination statutes.

Most recent judicial estoppel issues in discrimination jurisprudence have been the mirror image of the instant case. Employers have sought to invoke judicial estoppel against employees because of an actual or apparent inconsistency with a prior proceeding. These cases have generally involved the definition of "disability" under the Americans With Disabilities Act, in instances where an employee might establish a total disability to obtain social security or worker's compensation while claiming to be able to work for the employer with a reasonable accommodation.

Some circuits have applied judicial estoppel to these employee claims, even if the matter established in the first proceeding was not identical to that asserted in the second. *Cleveland v. Policy Management Systems*, 120 F.3d 513 (5th Cir. 1997); *McNemar v. The Disney Stores*, 91 F.3d 610 (3d Cir. 1996); *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992).

Other circuits have declined to apply judicial estoppel in the context of discrimination statutes. *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997); *Blanton v. Inco. Alloys Int'l, Inc.*, 108 F.3d 104 (6th Cir. 1997), *supplemental opinion*, 1997 WL 525292 (6th Cir. August 22, 1996); *Swanks v. WMATA*, 116 F.3d 588 (D.C. Cir. 1997).

It is important for the sake of consistency in application of federal law for this Court to determine how judicial estoppel applies to discrimination statutes. In the instant case, for example, the argument for judicial estoppel

is strong because the matter sought to be proved was exactly the same in both proceedings and both tribunals conducted complete adversarial proceedings with representation of all parties by counsel, discovery, compulsory process for witnesses, and complete cross-examination. This is far more persuasive a case for judicial estoppel than, for example, a person deemed totally disabled for social security purposes on a paper application who is later estopped thereby from claiming to be a qualified person with a disability for purposes of a discrimination statute. The conflict in the circuits is, therefore, important, potentially far-reaching, and ripe for adjudication by this Court.

CONCLUSION

Based on the authorities cited and the arguments presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Appendix

APPENDIX A -- ORDER OF THE FLORIDA FIRST DISTRICT COURTOF APPEAL DENYING REHEARING, AUGUST 28, 1997.

District Court of Appeal,

First District.

Tallahassee, FL 32399
Telephone No. (904) 488-6151

August 28, 1997

No. 96-03774

L.T. Case No. 93-4635

Connie Yon, Delores Bryant,

Appellant(s),

v.

Department of Corrections et al,

Appellee(s).

BY ORDER OF THE COURT:

Appellants' motion for hearing, for certification, and for rehearing en banc, filed August 4, 1997, is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/

John S. Wheeler Clerk
By: /s/ Faith R. Leynes
Deputy Clerk

Copies:
Richard E. Johnson
Jesse F. Suber
John. A. Grant
Laura Beth Faragasso
Craig A. Dennis

APPENDIX B -- ORDER OF THE FLORIDA FIRST DISTRICT COURT OF APPEAL AFFIRMING *PER CURIAM* THE JUDGMENT OF THE TRIAL COURT, JULY 18, 1997.

District Court of Appeal

First District, State of Florida

No. 96-3774

Connie Yon, Delores Bryant,

Appellants,

v.

Department of Corrections et al. of the State of Florida and Steve Comerford, individually,

Appellees.

Opinion filed July 18, 1997.

An appeal from the circuit court for Leon County, William L. Gary, Judge.

Richard E. Johnson of Spriggs & Johnson, Tallahassee Attorney for Appellants.

Jesse F. Suber and Laura Beth Faragasso of Henry, Buchanan, Hudson, Suber & Williams, P.A., Tallahassee, Attorneys for Appellee Department of Corrections of the State of Florida

Craig A. Dennis and John A. Grant of Dennis & Bowman, P.A., Tallahassee, Attorneys for Appellee Comerford.

Per Curiam.
Affirmed.
Booth, Wolf and Van Nortwich, JJ., concur.

APPENDIX C -- FINAL JUDGMENT FOR DEFENDANTS, CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA, SEPTEMBER 4, 1996.

The Circuit Court,

Second Judicial Circuit,

In and for Leon County, Florida

No. 93-4635

Connie Yon, Delores Bryant,

Plaintiffs,

v.

STATE OF FLORIDA, Department of Correction, and Steve Comerford, individually,

Defendant.

FINAL JUDGMENT

Pursuant to the verdict rendered in this action, it is adjudged that Plaintiffs, Connie Yon, and Delores Bryant, take nothing by this action and that the Defendants, State of Florida, Department of Corrections, and Steve Comerford, in his official capacity, shall go hence without day. The court reserves jurisdiction to determine costs, interest, and attorney fees pursuant to the offers of the judgement which were filed previously in this case, as well as any issue related to the applicability of the offers of judgement.

Done and ordered at Tallahassee, Leon County Florida, this 4th day of September, 1996.

/s/ William L. Gary
Circuit Judge

Copies furnished to:

Mr. Richard E. Johnson
Mr. John A. Grant
Mr. Jesse F. Suber

APPENDIX D -- FINAL ORDER OF THE FLORIDA PUBLIC EMPLOYEE RELATIONS COMMISSION, ADOPTING HEARING OFFICER'S RECOMMENDED ORDER, AUGUST 26, 1993.

State of Florida

Public Employee Relations Commission

No. CS-93-205

Steve Comerford,

Employee,

Department of Corrections,

Agency.

FINAL ORDER

Robert A. Pell Panama City, attorney representing employee.

Ernest L. Reddick, Tallahassee, attorney representing agency.

On April 28, 1993, the Agency imposed discipline upon Steve Comerford in the form of a dismissal. Comerford appealed to the Commission and a hearing was held in Bristol before an appointed hearing officer on June 30, 1993. The hearing officer issued his recommended order on July 28, 1993, concluding that the Agency had just cause to discipline Comerford, and that the mitigation is not appropriate. Neither party excepted to the hearing officer's order.

We accept the hearing officer's findings of fact. Furthermore, we agree with the hearing officer's analysis of the dispositive legal issues, conclusions of law and recommendations.

Accordingly, the hearing officer's recommended order is ADOPTED as the Commission's final order and Comerford's appeal is DISMISSED. § 120.57 (1) (b) 10., Fla. Stat. (Supp. 1992).

This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission and the district court of appeal within 30 days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in section 120.68, and 447.504, Florida Statutes, and the Florida Rules of Appellate Procedure.

Alternatively, a motion for reconsideration may be filed. The motion must be received by the Commission within 15 days from the date of this order. The motion shall state the particular points of fact or law allegedly overlooked or misapprehended by the Commission, and shall not reargue the merits of the order. For Further explanation, refer to the Florida Administrative Code Rule 38D-15.005.

It is so ordered.
Horne, Chairman, Sloan and Anthony, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on August 26, 1993.

By: /s/ Glenda G. Eubank
Clerk

/mad

APPENDIX E -- FLORIDA PUBLIC EMPLOYEE RELATIONS COMMISSION, HEARING OFFICER'S RECOMMENDED ORDER, July 28, 1993.

State of Florida

Public Employee Relations Commission

Steve Comerford,

Employee,

Department of Corrections,

Agency.

HEARING OFFICER'S RECOMMENDED ORDER:

Ruby, Hearing Officer.

On April 28, 1993 Correctional Officer Major Steve Comerford was notified of his discharge by the Department of Corrections (Agency) for sexual harassment of five co-workers. On May 7, Comerford filed a timely appeal with the Commission.

On June 30, after due notice, a public hearing was conducted in Bristol before the undersigned Commission-appointed hearing officer. The following appearances were entered:

For the Employee:

Robert A. Pell, Esquire
405 Oak Avenue
Post Office Box 651
Panama City, Florida 32402

For the Agency:

Ernest Reddick, Esquire
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500

All parties were afforded the opportunity to submit evidence, cross-examine witnesses and fully participate. In addition to arguing that the Agency had no cause for disciplinary action, or if it did that the disciplinary action was too severe, Comerford alleged that there was harmful procedural error in the Agency's predetermination process. Both parties indicated that post-hearing written submissions would be filed. The parties' submissions have been timely filed and duly considered.

I. ISSUES

The following issues were presented for resolution in this case:

1. Whether there was harmful procedural error in the Agency's predetermination process.
2. Whether the Agency had just cause to discipline Comerford.
3. Whether the severity of punishment should be mitigated if there was cause for disciplinary action.

II. STIPULATIONS[1]

1. The public Employees Relations Commission had jurisdiction of this case under Chapter 447, Florida Statutes.
2. Comerford was a permanent status career service employee at the time of his discharge and the Agency is a State

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[1]The parties entered into certain factual stipulations that for stylistic purposes are incorporated below in my findings of fact.

agency as defined by Chapter 110, Florida Statutes.

III. FINDINGS OF FACT

Based on the testimony, exhibits, stipulations, and the record as a whole, I make the following findings of fact:

1. Comerford held the rank of Correctional Officer Major at Liberty Correctional Institution (LCI), an Agency facility which houses adult male inmates ranging from minimum to close custody. As a Major, Comerford was in complete charge of all correctional officers at LCI, and was considered third in the command of the facility (after the Superintendent and the Assistant Superintendent). Working at LCI is considered to be an exceptional career opportunity in Liberty County.[2] Because of this perception, LCI workers may be willing to endure abuse from superiors that they would not tolerate in ordinary circumstances.[3]

2. Comerford had worked for the Agency for approximately nineteen and one-half years at the time of his discharge. Comerford had received exceeds performance standards rating for the four years prior to his discharge, and was considered by his superiors to be a valuable employee. Comerford had never been disciplined for any offense prior to his discharge. Nevertheless, Comerford had been the subject of

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[2]Liberty County is a rural county, with few employment opportunities. I credited the testimony of both Yon and Bryant that they considered employment at LCI with the Agency to be an outstanding employment opportunity in the County.

[3]This is a reasonable inference from the testimony and facts as determined in this case. Thus, a friendly attitude toward a supervisor that is resented may be more of an attempt to "get along" for the sake of continued employment.

prior Agency sexual harassment investigations. The last prior sexual harassment investigation took place while Comerford was a Correctional Officer Lieutenant at his last assignment prior to coming to LCI. At that time, he was told that he was guilty of "poor judgement" in his actions toward female subordinates that lead to the investigation.

3. There is no Agency policy against co-workers dating or maintaining a personal relationship. Similarly, there is no Agency policy against superiors dating or having a personal relationship with their subordinates. The Agency does however, maintain a policy against sexual harassment. See discussion infra. Comerford was informed of this policy. Nevertheless, Comerford utilized his position as third in command of LCI and the Agency's lack of anti-dating policy to solicit personal relationships of a sexual nature with LCI female co-workers.[4] Comerford's activities were considered offensive, but not complained of because of a perception that anyone complaining would have a difficult time accusing such a high-ranking LCI official.[5]

4. Priscilla Causseaux works in the LCI personnel office. She has, on occasion as part of her duties, to meet or

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[4]Comerford's testimony that female co-workers were attracted to him, and that all he was doing was responding to their overtures was not credited.

[5]Priscilla Causseaux's testimony showed that LCI employees felt they would endure real difficulties in filing sexual harassment complaints against Comerford. Causseaux worked in the LCI personnel department, where the Agency's sexual harassment policy is enforced (i.e., where sexual harassment complaints could be filed). Yet although she credibly testified that she was being sexually harassed by Comerford, she was reluctant to file a formal complaint because of the difficulties that she perceived that she would have to endure. (T 165-66).

talk with Comerford by phone or in person. On occasion, Comerford would tell Causseaux that she "looked good" or "smelled good". On one occasion, in 1991, Comerford asked Causseaux "to meet him down a dirt road" after 5:00 p.m. Comerford's offer to meet Causseaux was reasonably interpreted by her as solicitation to have sex with him. This offer was unexpected and unwelcome.[6] Causseaux and Comerford were on the telephone at the time. Causseaux immediately put the telephone receiver down. Comerford then called her back and asked if she understood his remark. She stated that she understood, but declined his offer.

5. Comerford left Causseaux alone until the first of 1993, when Comerford began complimenting Causseaux's appearance again over the phone. He then came to her office asking her if she had reconsidered his prior request (to meet him for sexual liaison after work). Causseaux indicated her rejection by hitting Comerford with a file folder. Comerford's unwelcome, uninvited and offensive solicitations and remark made Causseaux feel uncomfortable.

6. Tammy Shuler also worked in the personnel office. Although she did not work directly for Comerford, she would have occasion to speak to him on work-related matters. Comerford asked Shuler if she "wanted to meet him after work." Comerford would ask her this question during a period of time since her employment at LCI, beginning in May 1989, once every two or three weeks, and then sometimes once every three or four months. Each time, Shuler would tell Comerford she was not interested. Comerford would ask this question both in person and over the telephone at work.

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[6]Comerford's testimony otherwise is not credited.

7. After Shuler moved from the LCI personnel office to the LCI business office, Comerford would appear at Shuler's work place, and make an obscene gesture by sticking his tongue out and moving it around. This happened on two or three occasions. Shuler found Comerford's actions and solicitation to be both unwelcome and offensive.[7]

8. Correctional Officer Brenda Hand worked as Comerford's secretary or clerk for about nine months ending in November or December of 1992. When Hand notified Comerford that she was thinking about going back on shift work as a regular correctional officer, and ending her employment as his clerk, Comerford decided to approach Shuler to replace Hand. Shuler was qualified to replace Hand because Shuler is a certified correctional officer.

9. When first approached by Comerford concerning the vacancy Shuler told him she would have to think about it. Subsequently, Shuler spoke to Comerford. She told Comerford "that I'd love to come to be his clerk, but that was all that I was interested in". She felt it necessary to say this to Comerford because of his prior suggestive comments toward her. (T 174)[8] Comerford subsequently told Shuler that he chose someone else to be his clerk. Shuler's notice to Comerford that she would

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[7]Comerford's testimony denying his alleged actions was not credited. Comerford gives no reason for Shuler's testimony against him (bias, interest, or other substantial reason to discredit her testimony) (T 343).

[8]"T" followed by the page number indicates the page of official transcript that is being cited for the proposition in question. "A" and "E" or "J" followed by the number indicates the exhibit of either the Agency, the Employee or Joint exhibit respectively. Reference to the transcript or exhibits do not necessarily indicate the sole evidentiary support for the pertinent factual finding.

not accept the clerk position with the idea that she was accepting more than the normal duties of the job was considered by Comerford in his non-selection of her for the position.[9]

10. Susan Johnson works at the LCI medical department. Previously, she had worked at the LCI business office. Comerford had no regular business at the LCI business department. While visiting the business department, in Johnson's presence, Comerford would make gestures with his tongue. Both Comerford and Johnson knew that these gestures were intended as sexual reference.[10] The gestures were uninvited by and offensive to Johnson. Comerford's visited Johnson's office over a six to eight month period on a very frequent basis. Subsequently, during working hours, Comerford called Johnson on the LCI telephone system and asked Johnson if she understood what he meant. Johnson stated that she did. Comerford asked if she was "interested". Johnson stated she was not, and Comerford stopped his offensive conduct.

11. Correctional Officer Delores Bryant was hired by the Agency in March 1989. Comerford originally interviewed Bryant for the position at LCI, but she began her employment at Calhoun Correction Institution. When Bryant transferred to LCI, Comerford was two levels of supervision above her. During her initial employment, Comerford made obscene gestures or motions with his tongue toward Bryant. He would also lustfully move his eyes over her body. She said nothing, even though she found his conduct offensive and unwelcome.

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[9]Comerford's testimony that the person selected was selected solely because of her better qualifications for the job was not credited. Comerford's testimony that he was seriously considering employing Shuler for his clerk was credited.

[10]Comerford's testimony otherwise is not credited.

12. Comerford knew that Bryant was a single parent and the sole financial support of three children. (T 338) Bryant wished to work day shift all the time for her children's sake. Nevertheless, as a regular staff correction officer, she was supposed to rotate between the other two shifts. Although Comerford constantly reminded Bryant that she was supposed to be rotated between other shifts, he granted her request to be kept on the day shift.[11] In addition, Bryant used a significant period of leave time during her employment to care for her children. Nevertheless she was promoted to the position of Correctional Officer Sergeant in April 1992, and not initially criticized for either using too much leave or remaining on the same shift.

13. Bryant met Comerford in 1991 after work pursuant to his request. By this time, Bryant knew what a meeting "after work" meant to Comerford (i.e., that Comerford wished to have sex).[12] She had avoided his prior requests to meet after work. However, this occasion took place when Bryant's nine-year-old son was having surgery and her fifteen-year-old daughter had just been involved in an accident. Bryant felt particularly vulnerable concerning her employment. Bryant met Comerford and they had sexual intercourse. Bryant felt like she "had no other choice" if she wished to remain employed on the first shift and support her hospitalized children. (T 201)

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[11]Comerford admitted that Bryant requested "on numerous occasions" that she be kept on day shift, and that he kept her on day shift, despite a policy of rotating correctional officers between shifts. (T 330-31)

[12]The parenthetical comment is a reasonable inference from all of the testimony at the hearing. Contrary to Comerford's argument, the evidence did not indicate that he wished to "date" other employees, which he did not have the time to do as a married man (see footnote 24), but that he wished to have sex with the female co-worker he spoke to.

14. Subsequently, Comerford would "pull" Bryant (i.e., take her from her regular duties as correctional officer) to work in his office, to replace other employees who were absent. At these times, Comerford would have his office door closed and the shades down. He would tell Bryant how good she looked, and indicate that he wanted them "to get together again." Bryant would try to avoid Comerford's unwelcome passionate touches through stating that she was uncomfortable and that she expected someone to walk into the office at any moment. Comerford would ignore Bryant's attempts to avoid his grasps and continue to fondle and caress her. Bryant was "pulled" a significant number of times to come to Comerford's office.

15. Bryant was promoted to Correctional Officer Sergeant in April 1992. In September or October of 1992, Bryant indicated her unwillingness to participate in Comerford's continuing activities of: passionate feeling all over her body with his hands, attempting to kiss her, and soliciting her to have more sexual intercourse. After she did this, Comerford exhibited a hostile attitude towards Bryant. Further, Bryant was moved to the midnight shift from the day shift. Bryant had used up all of her leave and began using leave without pay in June 1992 without any negative comment by her superiors. Nevertheless, on December 25, 1992, Bryant was counseled by her immediate supervisor concerning Bryant's alleged excessive use of leave, pursuant to instructions from Comerford.

16. After Christmas 1992, Bryant was called to Comerford's office, when he returned to work from vacation. Bryant decided that she had been called to Comerford's office after her shift change and counseling for her to continue her prior relationship with Comerford (i.e., allowing Comerford to fondle her and make sexually suggestive remarks). She decided to resign rather than continue in the previous relationship she

had with Comerford. Comerford tried to dissuade Bryant from resigning, by indicating that she was the sole support of her children and that the Agency was the best employer for her in the community. Nevertheless, Bryant resigned, after her two weeks' notice, on January 15, 1993.[13]

17. Correctional Officer Connie Yon was the first female correctional officer hired at LCI in September 1988, when LCI opened. In approximately April 1989, Yon became the mail room officer, responsible for processing inmate mail in and out of LCI. She worked the day administrative shift, beginning at 8:00 a.m. and ending at 5:00 p.m. Comerford worked the same shift, and supervised Yon's supervisor. Yon's work location was in proximity to Comerford's office.

18. Yon's work as the postal clerk was subject to numerous complaints, including those of her immediate supervisors. Yon was seriously concerned about these complaints. Comerford indicated to Yon that the then LCI Superintendent, Ragans, had indicated that Yon should be removed from her postal clerk position. Yon was single parent, responsible for the support of herself and a minor daughter, and seriously worried about keeping her job. Yon has an adult daughter who does not live at home.

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[13]In addition to the demeanor, there were two additional reasons for crediting Bryant's allegations against Comerford. Bryant's resignation without another job was consistent with the desperation of someone who had "had enough." I believed Comerford's evidence that Bryant did not have another job when she quit at the LCI. Bryant's testimony that she had had enough of Comerford's harassment was consistent with an otherwise irrational act of resigning a good job without substitute employment. The second reason was that during the Agency's investigation of the sexual harassment claim of Bryant, Comerford could not explain any reason why Bryant would have made a false statement against him. (A 1)

19. In September 1990, when Yon's minor daughter became seriously ill and went to the hospital Comerford asked Yon to go with him to "get some peanuts." Yon was unaware that Comerford had invited her to have sexual relationship with him. While Yon and Comerford were in a peanut field located near LCI, Comerford began making statements to Yon concerning her job security. Comerford stated that he was the only thing "between you [Yon] and the Superintendent." Comerford also stated, "I'll scratch your back, if you'll scratch mine." Comerford suggested that they have sexual intercourse. Yon submitted fearing for her job, as well as knowing that the Agency's medical insurance was paying for Yon's daughter stay at the hospital.[14]

20. Comerford called Yon from her job and into his office over the next four months to solicit sex from her. He closed his door, pulled the shades, and began passionately feeling her body (including her breast and genital area) while soliciting sex. Yon endeavored to dissuade Comerford from persisting in his conduct by stating that her minor daughter was sick, and that she had a lot on her mind.

21. In January 1991, Yon's father was placed in a hospital and died. Comerford ceased calling Yon into his office until after her father's death until March 1991. At that time, Comerford ordered Yon to his office, and moved his hands over her body while making comments indicating his sexual desires. Comerford insisted that "they meet somewhere" (indicating that he wished to have relations outside of LCI). Yon indicated that she was not interested in having sex with Comerford, and that she had been dating someone else since February 1991. In July

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[14]Comerford admitted to sexual intercourse with Yon in a nearby peanut field. Comerford's testimony that the idea of sexual intercourse was Yon's was not credited. See discussion infra.

1991 Yon married.

22. In September 1991, Yon's adult daughter was killed in an automobile accident. In October 1991, Yon was divorced. During this period of time, when Yon was home on sick leave, because of depression due to her daughter's death, another LCI employee attempted to have sexual intercourse with Yon at her home. Yon reported this to Comerford, who asked that Yon keep the incident quiet so that Comerford could use the incident against the other LCI employee, should Comerford have any difficulty with that employee.[15] In April 1992, Ragans was replaced as LCI Superintendent.

23. Subsequently, in approximately June 1992, Yon was again called to Comerford's office. She was asked to close the door, and Comerford pulled the window shades. Comerford started rubbing Yon's breast and between her legs with his hands and tried to kiss her. Comerford asked Yon if she was not lonely, and "didn't [she] want some." Comerford asked Yon, "wasn't peanuts about ready again". Yon told Comerford "no, they were not." Yon also told Comerford "no, I was not lonely and sex was the last thing on my mind." Yon began crying and said "I have been through enough." Comerford began telling Yon what a friend he was to her, and that she knew that Superintendent Ragans had not wanted her in the mail room, but he [Comerford] had always "stood between her and Ragans."[16]

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[15]Comerford's testimony otherwise is not credited.

[16]In addition to Yon's testimony at the hearing, her affidavit given in support of the Agency's predetermination letter was considered in my finding of facts. (A 1) § 120.58, Fla. Stat. (1991). I indicated at the beginning of the testimony of witnesses that affidavits would not be considered for findings of fact unless witnesses testified and were subject to cross-examination. I subsequently indicated that, since Yon had been

24. Around October 1, 1992, Comerford called Yon to his office, again with the door closed and the shades drawn, and started to touch Yon's breast and between her legs, while trying to kiss her. Yon asked Comerford to stop. Subsequently, at the end of October 1992, Yon was told by Comerford that she would be removed from the mail room until the next shift, and then she would be replaced back in the mail room. Yon was concerned about her mail room job, even though Ragans was no longer Superintendent, because of significant criticism from her immediate supervisor (who was supervised by Comerford). She asked if he was sure she would be placed back in the mail room. Comerford stated that he was sure that she would be back. Comerford stated, "I've never lied to you before, you have my word".

26. Comerford's action in removing Yon from the mail room was because of complaints that Comerford has consistently received concerning the poor performance of the mail room. Poor performance was not indicated in Yon's performance evaluations (which were all exceeds performance standards ratings), and Yon felt therefore that any criticism by either her immediate supervisors or by Comerford was unmerited. Yon felt that many of the difficulties in the mail room were not caused by her, but by her co-workers. However, Yon was ultimately responsible for the poor performance of the mail room, and her evaluations did not fairly address performance problems in the mail room. Comerford had not lied to Yon about Superintendent Ragans complaints about the mail room. Comerford had nevertheless endeavored to keep Yon in a job that was close to him and that she was apparently liked as a reward for her favorable attitude toward him including having sexual relations with him. When a new

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extensively cross-examined utilizing her affidavit, I would use the affidavit for fact finding purposes. (T 126-27)

Superintendent came to LCI, Comerford was no longer able to keep Yon in the mail room, despite his best efforts.[17]

27. Subsequently, in January 1993, because of additional mail room deficiencies (concerning Christmas packages for inmates), Yon was permanently removed from the mail room.[18] Yon believed that she had been removed because of a less-than-favorable attitude toward Comerford. Also in January, Yon attended an Agency seminar for female employees, in which she became convinced that complaints of sexual harassment would be seriously considered by Agency personnel, and that she would not be retaliated against for making such complaints. Accordingly, Yon filed a sexual harassment against Comerford February 8, 1993.

28. When Yon confronted Comerford, she indicated to him that she felt that her adverse treatment (i.e., being removed from her mail room job) was because she refused to engage in sexual relations with Comerford. Yon stated this belief because of the numerous times that Comerford had indicated that being nice to him had assured her remaining in her mail room job, despite apparently unwarranted complaints from her superiors and others. Yon indicated that Comerford "could do whatever he wanted to, but I [Yon] would not be having sex ever with him again". Comerford indicated that he could give

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[17]This finding is based upon reasonable inferences from the evidence as well as credibility resolutions. Testimony was credited that Yon did not perform her mail room job adequately, and thus was subjected to constant criticism from her immediate supervisors. Yon felt that this criticism was unwarranted because she constantly received exceed performance ratings. Apparently, she received these unwarranted ratings for something other than work-related performance. See discussion infra.

[18]Evidence was credited that indicated that the alleged package difficulties were the final reason for Yon's removal from the mail room.

another job to Yon, in the property room which was then currently occupied by a male. Yon refused the job.[19]

29. On April 12, 1993, Comerford was given a predetermination letter, informing him that he was being charged with sexual harassment against Yon, Bryant, Shuler, Johnson and Causseaux. Attached to the letter was an investigative report. The Agency alleged that Comerford's conduct and sexual harassment violated Agency rules found at Florida Administrative Code Rule 33-4.0019 (4) (a) 33-4.002 (4), and 33-4.003 (23), (25), and (34), as well as the Agency Policy of Sexual Harassment. Comerford was further notified that his prior employment record would be considered in determining the appropriate disciplinary action to be taken. Attached to the letter was an April 20, 1988, Agency investigation into sexual harassment allegations against Comerford while he served as a Correctional Officer Lieutenant in 1988 at Calhoun Correctional Institution.

30. Comerford requested a predetermination conference, which was held on April 22, 1993. Comerford was notified by letter on April 28, 1993, that LCI Superintendent James A. Ivey had decided to discharge Comerford because of the charges against him. It is Ivey's usual practice, after a predetermination conference, to consult with the Agency's Regional Director, W.F. Rouse. This consultation is not required by the Agency's predetermination procedures which only require that the Regional Office be notified of the pending disciplinary action and the reason therefore. (A 9) After Comerford's predetermination conference, Ivey telephoned Rouse. Rouse had received a copy of the predetermination

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[19]Comerford did not deny Yon's testimony that she had been offered this job when she confronted him upon losing the mail room job, and that the job would have to be taken away from the male incumbent.

letter. Rouse stated that he did not feel that there was a need for the two to have a meeting concerning the Comerford case. (T 297-99)

31. Ivey signed Comerford's discharge letter as the Agency's properly designated representative to take disciplinary action. (J 1; A 10) Before signing the letter, and giving it to Comerford, Ivey reviewed the letter and its contents with the Agency's legal department, pursuant to Agency policy. The legal department did not dissent from his proposed action. (T 299-300; A 9)

32. Rule 33-4.001 (4) (a) states, in applicable part, that "No ... employee shall knowingly ... commit any act or engage in any conduct which would violate any state statute, rule, directive or policy statement." Rule 33-4.002 (4) states, in applicable part, that "Each employee ... shall perform his duties fairly and impartially and otherwise conduct himself both on-duty and off-duty so as to command the respect of fellow employees, persons on parole, probation or otherwise under his supervision, inmates and the general public."

33. Rule 33-4.003 (23) states that a first offense of conduct unbecoming a public employee is punishable by a written reprimand, up to thirty days suspension, or dismissal. Rule 33-4.003 (25) states that a first offense of willful violation of rules, regulations, directives or policy statements is punishable by a written reprimand, up to thirty days suspension or dismissal. Rule 33-4.003 (34) states that a first offense of failure to follow oral or written instructions is punishable by a written reprimand, up to thirty days suspension or dismissal.

34. Comerford has previously been given a copy of the written Agency policy against sexual harassment, and has received training, as have other Agency employees concerning

this policy. That policy defines sexual harassment as:

> Unwelcome sexual advances, unwelcome requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature when:
>
> *Submission to such conduct as made either explicitly or implicitly a term or condition of a person's employment or
>
> *Submission to, or rejection of, such conduct by [sic] decisions affecting an individual or
>
> *Such conduct has the purpose or effect of substantially interfering with a person's work [sic] hostile or offensive working environment.

35. The Agency sexual harassment policy states sexually harassing behavior includes the following:

> 1. The alleged conduct must be of a sexual nature must be unwelcome and unwanted.
>
> 2. Sexual harassment may be any of, but is not limited to, the following:
>
> *threatening actions against someone to have sexual favors performed; -
>
> *intimidating, by way of suggesting a desire for sexual relations or physical contact;
>
> *continued suggestions regarding invitations to social events outside the work place, after being told such suggestions are unwelcome;

*use of offensive terms that have a sexual nature;

*use of sexual degrading words to describe a person;

*jokes or remarks of a sexual nature in front of people who find them offensive;

*use of sexually suggestive objects;

*display of pictures that embarrass or offend in the work place;

*prolonged staring or leering at a person;

*whistling as to attract attention to a person;

*uninvited physical conduct contact, as touching, hugging, patting or pinching, and

*suggestive telephone calls or letters.

36. The Agency policy further states, "Any employee who has been found to have sexually harassed another employee or applicant for employment shall be subjected to disciplinary action up to and including dismissal". The Agency policy further states under "Employee Responsibilities" that "Be sure you understand you and your co-workers have the legal right to work in an environment free from sexual harassment and intimidation". Finally, the "Responsibilities" portion of the Agency's policy indicates that it is an Agency employee's responsibility to learn the Agency's policy on sexual harassment. Employees who are harassed have the responsibility to state to the harasser, pursuant to the Agency's

policy, that the harassment is unwelcome, and if it is not stopped to report the harassment to the harasser's superior.

IV. PROPOSED FINDING OF FACT

In making my finding of fact, I have carefully reviewed and considered each of the proposed findings of fact submitted by the parties. I have adopted in substance all of the findings of fact submitted by the parties with the following exceptions.[20]

The following proposed facts are rejected as not supported by the greater weight of the evidence: Agency first sentence of 5, last sentence of 6, first sentence of 12, and last sentence of 16 (the demeanor of the witnesses belied any statement that they did not feel harassed); Comerford 6 and 7 (to the extent that it implies that Comerford's activities in soliciting sex were akin to dating, flirting or telling jokes; Yon did not flirt with Comerford), first sentence of 8, second sentence of 8 (to the extent that it implies that Comerford's invitations to "get some peanuts" was a conversation that Yon wished to engage in), 21, 22, last sentence of 23, second sentence of 24, last two sentences of 24 and last sentence of 25 and 27 (the demeanor of the witnesses belied any statement that they did not feel harassed), second sentence of 28, 29, 31 (to the extent that this implies that this was not the policy before Ivey became Superintendent and that Comerford had not violated it through giving Bryant one shift all the time), 32, 35 (the fact that Comerford's action were not criminal does not

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[20] See generally ATU, Local 1579 v. City of Gainesville, 12 FPER ¶ 17124 at 235 (1986) (where a proposed finding of fact is adopted in substance, a hearing officer is not prohibited from recasting the statement for purposes of clarity and stylistic preference); Anderson v. City of Bessemer City, 470 U.S. 564, 571-73 (1985) (practice of not adopting verbatim a party's proposed finding of fact approved).

mean that they were not unwelcome or sexual harassment, which they were), and 37 (to the extent that it implies that he did not know that he was told that he had used "poor judgement").

The following proposed facts are rejected as unnecessary: Agency second sentence of 4, last sentence of 5, all of 11 except the first sentence, second sentence of 12, all of 13 except the second sentence, last sentence of 20, and 26; Comerford all of 16 except the last sentence, 17, 18, and last sentence of 36.

The following Comerford proposed facts are rejected as argument: 13-15, last sentence of 16, 19-20, 26, last sentence of 28, and 33-34.

V. DISCUSSION AND ANALYSIS

Comerford alleges that there was procedural error in his discharge in that Superintendent Ivey did not engage in a dialogue with the Agency's Regional Director, pursuant to Ivey's past practice, concerning the appropriate disciplinary action to be taken after the predetermination conference. Although Ivey had engaged in such a dialogue in the past, the Agency's disciplinary procedures do not mandate such a procedure. The Superintendent has the delegated authority to act in determining the appropriate disciplinary action. He is the one who signed Comerford's discharged letter, after the Agency's legal department's review of the final action letter for sufficiency. Therefore, the Regional Director's comment that there was no need to discuss Comerford's punishment with Ivey did not violate any explicit rights given by Agency procedures. Further, there has been no violation of either statutory or rule provisions applicable to State employees generally through the act of the Regional Director in refusing to discuss Comerford's

pending disciplinary action with Superintendent Ivey. See § 110.227, Fla. Stat. (1991); Fla. Admin.. Code Rule 60K-9.0044.

Nonetheless, assuming that somehow the comments made by the Regional Director to Superintendent Ivey somehow tainted Ivey's decision as to what disciplinary action to take (which it did not), the Commission has held that a de novo Commission hearing obviates any procedural discrepancies in disciplinary action taken by the State agency unless an employee is not put upon notice as to the allegations against him or her. E.g. Thompson v. Department of Health and Rehabilitative Services, 6 FCSR ¶ 089 (1991) (no prejudice in person conducting predetermination conference being a witness to alleged incident involving disciplinary action since employee had de novo Commission hearing concerning disciplinary action taken). In this case it is clear that Comerford knew all of the allegations made against him, which were intimately disclosed in a packet, including the Agency's investigation report, that was attached to his predetermination letter. Accordingly, I recommend that the Commission not find any harmful procedural error taken in Comerford's disciplinary action.

An employee who has permanent status in the State career service system may only be discharged for cause. § 110.227 (1), Fla. Stat. (Supp. 1992). The Agency has the burden of proving its allegations against Comerford by a preponderance of the evidence. See Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412, 414-15 (Fla. 4th DCA 1974); Duisberg v. Department of Corrections, 1 FCSR ¶ 10060 (1986); Fla. Admin.. Code Rule 38D-24.009. If the Agency fails to meet its burden the Commission will sustain Comerford's appeal. § 447.208(3) (b), Fla. Stat. (Supp. 1992).

In substance, the Agency alleges that Comerford

violated its known policy against sexual harassment of co-workers. Shuler, Johnson, and Causseaux were credited with their testimony that Comerford persisted in unsolicited, undesired, and offensive conduct and speech concerning his sexual predilections. Comerford's argument against disciplinary action is that he is not technically guilty of sexual harassment, as defined in holding employers liable for the acts of their supervisors. That is, Comerford generally admits (with some denials which were not credited) that, during working hours, he solicited female co-workers to engage in sexual relations with him, but that his actions did not technically constitute sexual harassment because he generally (although not always) quit when told that the female co-worker did not return his amorous advances and his at-work solicitations were for sexual activities away from work and during non-working hours. Comerford further argues that the Agency's sexual harassment allegation fails because none of his female accusers voiced opposition to him or his superiors until Yon filed her complaint of sexual harassment. Finally, Comerford argues that such comments by the persons harassed as "I could handle it" indicated that he had not made the workplace so onerous as to indicate a hostile workplace within the traditional meaning of sexual harassment legal precedent.[21]

Whether or not there would be employer liability under a private lawsuit for sexual harassment is largely irrelevant in determining whether or not an employee has violated an agency's rule or policy concerning the prohibition of

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[21]Based upon the demeanor of the witnesses it was clear that they found Comerford's actions and statements to be extremely offensive despite such statements of bravado in cross examination. It was clear to me that Shuler, Johnson, and Causseaux, as well as Yon and Bryant, were all distressed by Comerford's conduct and found it disgusting to have to tolerate it in the workplace.

unwelcome sexual advances requests for sexual favors, and other verbal or physical conduct of a sexual nature which creates an offensive working environment. See Tedder v. Department of banking and Finance, 7 FCSR ¶ 322 (1992).[22] The cumulative testimony and demeanor of Shuler, Johnson, and Causseaux as well as the demeanor and testimony of Comerford, convinced me that Comerford abused his position of authority through engaging in conduct and speech which created an offensive and hostile working environment for those female co-workers he chose to solicit for sexual activities.[23] Accordingly, the evidence indicated that Comerford violated the Agency's sexual harassment policy in creating a hostile or offensive working environment. See also Vickers v. Department of Corrections, 5 FCSR ¶ 108 at 346-47 (1990).

As noted by Comerford's own argument, his conduct concerning co-workers Yon and Bryant, if true, is significantly

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[22]Significantly the reason for persons to complain about harassment is so that an employer may correct the situation. This opportunity is given employers before they may be held liable pursuant to the theory of respondeat superior. That is, that the employer knew or should have known of the harassment and failed to take corrective action. Nevertheless, where the harasser is the employee's supervisor (here, Comerford was third in command at LCI), a failure to complain about the harassment may be excused even in a case against a employer. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72-73 (1986).

[23]Comerford's defense that he was engaging in activities that were unprohibited through soliciting "dates" with co-workers is thus rejected. The evidence showed that, "with regard to the totality of the circumstances", Comerford's actions in soliciting sexual relations with subordinates were reasonably "sufficiently severe or pervasive" to create an abusive working environment based upon the sex of his subordinates. See Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522-27 (M.D. Fla. 1991) (the fact that conduct may be within the "social mores" outside the workplace does not mean that it is not sexual harassment in the workplace).

more egregious and would establish sexual harassment under any legal standard. The testimony of Yon and Bryant is contradicted by that of Comerford, except for the fact that he had sexual intercourse with both of them. Comerford's testimony that this sexual intercourse was voluntary and was in fact sought by Yon and Bryant (i.e., that it was all their idea) was not credited.[24] Accordingly, Yon's and Bryant's testimony was credited that the idea of sexual intercourse was raised by Comerford, and that they were not attracted to him other than as subordinate officers attempting to please a superior who held the ability to decide their terms and conditions of employment.[25]

As a part of Comerford's case, it was argued and shown that both Yon and Bryant were less than efficient employees. If true, there must have been some other reason than their work-related performance for their thus unwarranted treatment by the Agency resulting in Yon staying in job that she arguably could not perform and Bryant receiving an ill-deserved promotion to Sergeant despite excessive leave usage.[26] Further,

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[24]Comerford testifies that Yon wished to have sex with him and solicited him to accompany her to a motel in Panama City. When asked on cross examination why he had not had sex with Yon in a motel room rather than the peanut field, as allegedly solicited by Yon, Comerford thought for a minute then blithely stated, "Well, I mean, I'm married." As a further explanation, Comerford stated, "How am I going to explain to my wife that I'm going to spend the night with some woman somewhere?" (T 351-52)

[25]Comerford's testimony that women were attracted to him was not credited. When asked by his own attorney to state specifically how these women manifested this attraction, Comerford testified that he knew that Yon was attracted to him because of "her general demeanor, the way she carried herself." (T 306-07)

[26]While neither Yon's nor Bryant's performance was directly an issue in the case, it appeared that disinterested witnesses confirmed Comerford's argument that Yon's performance in the mail room was

despite alleged work deficiencies in the mail room, Yon consistently received exceeds performance standard ratings. In addition, despite an LCI policy of shift rotations Bryant was kept on the day shift. These all indicate that something other than work-related considerations were causing the preferential treatment of Bryant and Yon.[27] Accordingly, the circumstantial evidence, as well as their demeanor, credited the testimony of both Yon and Bryant that they were coerced, as a single parent supporting sick and minor children, into sexual acts and conduct (including intercourse) which they found offensive and which was unwelcome and uninvited. A supervisor's solicitation of sexual favors for continued or preferential treatment on the job violates the Agency's sexual harassment policy which prohibits submission to sexual harassment as "either explicitly or implicitly a term or condition of a person's employment." (A 8) Accordingly, the Agency also has cause to discipline Comerford for his sexual harassment of Yon and Bryant in this respect. See Glover v. Department of Health and Rehabilitative Services, 5 FCSR ¶ 290 at 1031 (1990), recon. denied, 6 FCSR ¶ 016 (1991) (superior attempting to have sex with subordinates in exchange for work favors constitutes quid pro sexual

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lacking and that Bryant was perhaps guilty of excessive use of leave. While Yon may have been correct that some of the deficiencies in the mail room were not her fault there was significant evidence indicating that she was in authority over its operation and it had significant problems. Similarly, Bryant admitted to using every moment of leave time to which she was entitled.

[27]The argument that Ivey's arrival as new Superintendent caused Bryant's subsequent rotation off the day shift was not credited. Rather, Bryant's rotation off the day shift was consistent with her testimony that she informed Comerford that she would no longer engage in conduct of sexual nature with him (i.e., not allowing him to fondle and kiss her).

harassment).[28]

In addition to crediting both Yon and Bryant in their statements that sex with Comerford was implicitly or explicitly a condition of their continued favorable treatment by Comerford on the job, the testimony of Yon and Bryant was credited in that he also created an unfavorable or hostile environment for them with frequent suggestive comments and undesired and unwelcome touching. E.g., Leroy v. Department of Health and Rehabilitative Services, 3 FCSR ¶ 035 at 141 (1988) (sexual harassment of OPS employee under the supervision of the harasser by attempting to convince her that an extension of the employee's temporary OPS employment would be obtained in exchange for sexual favors). Accordingly based upon the credited testimony, the Agency has shown that Comerford has violated its rule against sexual harassment and that it has cause for disciplinary action against him.

Comerford has the burden to establish that the Agency punished him too severely. See Department of Corrections v. Dixon, 436 So.2d 323 (Fla. 1st DCA 1983); Barksdale v. Department of Professional Regulation, 2 FCSR ¶ 159 (1987); Fla. Admin.. Code Rule 38D-24.009 (2). Disciplinary action taken within the range of discipline given by the Agency policy is presumptively correct. See Williams v. Department of Transportation, 531 So.2d 994 (Fla. 1st DCA 1988); Eisemann v. Department of Health and Rehabilitative Services, 2 FCSR ¶

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[28]Sexual harassment may be of two types: hostile or offensive work environment or quid pro quo. Quid pro quo harassment occurs when a supervisor sexually solicits a subordinate in exchange for promises of tangible job benefits if the employee submits or under threats of adverse job consequences if the employee refuses. Working environment harassment involves sexually oriented conduct that creates an intimidating, offensive, or hostile work environment. Tedder, 7 FCSR ¶ 322 at 1182.

173 at 1314 (1987).

Comerford was accused of violating the Agency's policy against sexual harassment. A violation of the Agency's policy against sexual harassment is also a violation of its rule prohibiting conduct unbecoming a public employee. Avant v. Department of Corrections, 7 FCSR ¶ 171 (1992) (hostile environment sexual harassment by a male supervisor on probationary female subordinate constitutes conduct unbecoming). Comerford was discharged for, inter alia, conduct unbecoming a public employee. Discharge was within the range of disciplinary action that could be taken for violating the Agency's rule prohibiting conduct unbecoming a public employee. Accordingly, Comerford's discharge is presumptively correct. Avant supra.

Section 447.208(3)(c) vests the Commission with limited discretion to mitigate the severity of a particular disciplinary action. The Commission's discretion is limited to the consideration of the following facts:

1. The seriousness of the conduct as it relates to the employee's duties and responsibilities.

2. Action taken with respect to similar conduct by other employees.

3. Previous employment record and disciplinary record of the employee.

4. Extraordinary circumstances beyond the employee's control which temporarily diminished the employee's capacity to effectively perform his duties or which substantially contributed to the violation for which punishment is being considered.

No evidence was shown concerning the second and fourth mitigation criteria.[29] Accordingly, mitigation factors 2 and 4 are neutral.

Comerford has been a State employee for a substantial period of time. Nonetheless, where a supervisor has engaged in prior sexual harassment, and been warned concerning his conduct, even a long-term employee may be discharged. Avant, supra. Comerford was previously told, after a prior sexual harassment episode in which he was involved, that he had used "bad judgement." Accordingly, Comerford was aware that his activities in soliciting sex from co-workers were called into question by the Agency.[30] Regardless, Comerford ignored advice about his activities and continued his harassment of co-workers, including subordinates. The Commission has recently reaffirmed that sexual harassment is "a very serious offense militating heavily against mitigation." Padgett v. Department of

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[29]Evidence of a demotion of an Agency employee for offensive touching of his secretary was not consistent with the extensive allegations against Comerford. Therefore, "similar conduct" was not shown.

[30]Comerford's testimony that his recollection of the event where he was told he used "poor judgement" in a prior sexual harassment investigation did not include the 1988 investigation report which was attached to his predetermination letter, but rather concerned a prior incident (apparently with a report attached to the predetermination letter) in 1979. Comerford's testimony was not credited. The similarity of the allegations against Comerford in 1988 (i.e., that he used poor judgement and his statements to "young female" Agency employees) led to a reasonable inference that the 1988 incidents outlined in that report attached to the predetermination letter and the incident described by Comerford in his testimony were one of the same. Accordingly Comerford's transfer after that incident to LCI, albeit a higher grade, should have indicated to him that he should no longer use "poor judgement" in soliciting female subordinates for sexual favors.

Corrections, 8 FCSR ¶ 083 at 282 (1993).[31] This case is especially serious given Comerford's authority as third in command at LCI.

Accordingly, even though Comerford was a long-term employee, and an otherwise exceeds performance rating employee balancing that mitigation factor against the seriousness of the conduct as it related to his duties and responsibilities, as a third in command at LCI, and the fact that he was previously warned about his "bad judgment" in a prior sexual harassment investigation, mitigation of his discharge is not appropriate. Accordingly, I recommend that the Commission dismiss Comerford's appeal.

VI. CONCLUSION OF LAW

Based upon the record as a whole I make the following conclusions of law:

1. The public Employees Relations Commission had jurisdiction of this case under Chapter 447, Florida Statutes.

2. Comerford was a permanent status career service employee at the time of his discharge and the Agency is a State agency as defined in Chapter 110, Florida Statutes.

3. There was no harmful procedural error in the Agency's actions in discharging Comerford.

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[31]Unlike the employee in Padgett, who had a long and unblemished employment record, wherin the Commission decided that his record would cause it to mitigate the employee's dismissal to a demotion, the nature, severity, and persuasiveness of Comerford's actions in this case are clearly distinguishable in warranting a lack of mitigation.

4. The Agency has cause for disciplinary action taken against Comerford. §§ 110.227(1), 447.208(3) (a), Fla. Stat. (1991).

5. Upon the application of the mitigation criteria delineated in Section 447.208(3) (d), Florida Statutes, Comerford's discharge should not be mitigated.

VII. RECOMMENDATION

I recommend that the Commission DISMISS Comerford's appeal.

Any party may file exceptions to my recommended order, but any such exceptions must be received by the Commission withing twenty days from the date of this order. The Commission will not grant an extension of time for filing such exceptions unless good cause is shown.

ISSUED and SUBMITTED to the Public Employees Relations Commission in accordance with Florida Administrative Code Rule 38D-14.003(5) and SERVED on all parties this 28th day of July, 1993.

/s/
Jack E. Ruby
Hearing Officer

JER/bjk